United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7380

In The

United States Court of Appeals

For the Second Circuit

B

P/S

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

against

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

On Appeal From A Judgment Entered On July 2, 1976 In The United States District Court For The Western District Of New York

BRIEF OF DEFENDANT-APPELLEE THE MONROE COUNTY BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes And Rules

Texts And Other Sources

PRELIMINARY STATEMENT

Plaintiff Arthur F. Turco ("appellant") appeals from the final judgment dismissing his action, entered in the United States District Court for the Western District of New York on July 2, 1976 (78a). The opinion of District Judge Harold P. Burke (72a-77a) is not reported.

This action seeks to enjoin the enforcement of an order of disbarment entered in the New York State Supreme Court, Appellate Division, Fourth Department, on January 28, 1975. Matter of Turco, 46 A.D.2d 490, 363 N.Y.S.2d 349 (4th Dept., 1975), appeal dismissed, 36 N.Y.2d 490, 366 N.Y.S.2d 1029 (1975), motion for leave to appeal denied, 36 N.Y.2d 642, 366 N.Y.S.2d 1026 (1975), cert. denied, 423 U.S. 838 (1975).

COUNTERSTATEMENT OF ISSUES PRESENTED

On January 28, 1975 appellant Turco was disbarred by order of the Appellate Division of the New York State Supreme Court, Fourth Department. In the disbarment proceeding, apellant was charged with professional misconduct based on his conviction of two misdemeanors. He was afforded a hearing in mitigation and several opportunities for oral argument and written briefs. In these proceedings, he raised various arguments under the Due Process clause of

the Constitution of the United States. He filed a notice of appeal to the New York Court of Appeals as of right on constitutional issues, which was denied on a holding that "no substantial constitutional issue is directly involved." His motion for leave to appeal was denied. In a petition to the United States Supreme Court, which was denied, he raised all the issues presented in the complaint filed in District Court. The questions now presented are:

1. Whether res judicata bars a collateral attack on the state court judgment of disbarment on issues of due process of law that were litigated by appellant in the state court proceedings?

2. Whether appellant's equal protection arguments are wholly without merit in view of Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y., 1974), and Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y., 1975), affd. ___ U.S. ___, 47 L.Ed.2d 751 (1976)?

3. Whether the New York Appellate Division may adjudge a lawyer guilty of professional misconduct upon the basis of a conviction on a plea of guilty to the misdemeanor of common law assault in Baltimore, Maryland and a conviction on a plea of guilty to the misdemeanor of possessing a dangerous weapon in New York City, holding such convictions to be binding and conclusive, in spite of an assertion of innocence at the time of one of the two pleas?

4. Whether petitioner's rights under the Due Process clause were violated where the proceedings against him were initiated by a written petition, and he was afforded the opportunity to submit a written answer and present oral and written arguments prior to any adjudication of professional misconduct, the opportunity to present testimony at a mitigation hearing, the opportunity to review and respond to the written report by the justice presiding at the mitigation hearing and the opportunity to present written briefs and make oral arguments before the determination of any discipline?

COUNTERSTATEMENT OF FACTS

On May 8, 1973, following an investigation ordered New York State Supreme Court, by the Appellate Division, Fourth Department, the Monroe County Bar Association served a written petition on appellant Turco setting forth specific charges and requesting the Appellate Division to "make such order with respect to [Turco's] license to practice as an attorney and counselor-at-law as it deems proper..."[1] The allegations central to the petition were as follows:

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1. See Rules of the New York State Supreme Court, Appellate Division, Fourth Department, 22 N.Y.C.R.R. § 1022.9 (superceded effective Dec. 16, 1974); N.Y. Judiciary Law (McKinney 1969) § 90. The New York Disciplinary Procedures are discussed in Mildner v. Gulotta, 405 F.Supp. 182, 188-191 (E.D.N.Y. 1975), affd. ___ U.S. ___, 47 L.Ed.2d 751, 95 S.Ct. 1489 (1976).

5. On or about May 1, 1970, respondent, together with certain other individuals, was indicted in Baltimore, Maryland, in connection with the slaying of one Eugene Leroy Anderson on July 12, 1969. Specifically, respondent was charged with conspiracy to commit murder (indictment 2313), assault with intent to murder (indictment 2314, first count), common law assault (indictment 2314, second count), soliciting to commit a felony [murder] (indictment 2315), and soliciting to commit a felony [kidnapping] (indictment 2316). The aforesaid indictments are attached hereto as Exhibits "B", "C", "D", and "E" respectively.

6. On February 14, 1972 respondent entered a plea of guilty to the second count of indictment 2314, common law assault, in satisfaction of all pending charges. The transcript of proceedings on February 14, 1972 in the Criminal Court of Baltimore is attached hereto as Exhibit "F".

7. Respondent was sentenced to a term of five years in the custody of the Department of Correction but such sentence was suspended (Exhibit "F", p.47).

8. Respondent filed an appeal to the Court of Special Appeals of Maryland in proper person. The Appeal was argued orally on March 2, 1973. No decision has yet been rendered.[2]

* * *

10. On February 22, 1970 respondent was arrested in New York City and charged with possession of weapons, possession of dangerous drugs, possession of hypo instrument and obstructing Government administration. A report of such arrest by the New York City Police Department is attached hereto as Exhibit "H".

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2. The judgment of conviction was affirmed on June 13, 1973.

11. On March 8, 1974 respondent entered a plea of guilty to a violation of section 265.05 of the Penal Law (no specified subdivision) as a misdemeanor and on April 3, 1972 was conditionally discharged. The transcript of record of the Criminal Court of the City of New York is attached hereto as Exhibit "I".

12. A certified copy of the court record in the Criminal Court of the City of New York and the affidavit in support of the charges against respondent are attached hereto as Exhibit "J". The Decision of Justice Jack Rosenberg denying a motion to suppress certain evidence and certain admissions is attached hereto as Exhibit "K". The stenographic minutes of proceedings on March 8, 1972 when respondent entered a plea of guilty of unlawful possession of a weapon in violation of section 265.05 is attached as Exhibit "L".

13. Respondent appealed his conviction to the Appellate Term, First Department, which unanimously affirmed said conviction without opinion on December 19, 1972.

14. By reason of the foregoing, petitioner submits that respondent is or may be guilty of professional misconduct, crime, misdemeanor or felony.

On June 21, 1973 Mr. Turco filed a 61 page answer which, without denying the allegations in the petition, reviewed his personal history, his involvement with the defense of various Black Panther cases, his weapons arrest in New York City on February 22, 1970, his indictment i Baltimore on May 1, 1970 in connection with the death of Eugene Leroy Anderson on July 12, 1969, his "trip to Canada"

from April 1970 until he was extradited some 7 months later, and his reasons for his pleas to misdemeanor charges in New York City and Baltimore.

In September 1973 Turco moved for the dismissal of the charges against him (4a). In his brief, he argued that disciplinary action could not be based on convictions resulting from pleas accompanied by an assertion of innocence, in the absence of affirmative proof that Mr. Turco was guilty of the charges to which he pleaded guilty. The Appellate Division heard argument by counsel, then denied Mr. Turco's motion for an opportunity to relitigate his criminal convictions but permitted him a hearing to offer evidence in mitigation of the discipline to be adjudged (27a-30a).

The Appellate Division appointed Justice Lyman H. Smith of the Supreme Court "to take such proof in mitigation as [Turco] may offer and report the same.... without making recommendation..." (31a). Hearings were held on March 28 and 29, April 4 and 5, and May 2, 3 and 21, 1974 (19a-20a). Mr. Turco presented extensive evidence of his character and legal ability and testified, among other things, that he was innocent of the specific charges to which he pleaded guilty (4a-5a; 20a).

After Justice Smith presented his written report (5a), Mr. Turco submitted a 69 page brief comprehensively

reviewing his background, and addressing all issues raised in the mitigation hearing including his "stay in Canada" from April 1970 until extradition proceedings were begun (5a-6a). Oral argument was again permitted before the Appellate Division (20a). On January 28, 1975 the Appellate Division entered its order of disbarment based on its written opinion (48a-59a). Matter of Turco, 46 A.D.2d 490; 363 N.Y.S.2d 349 (4th Dept., 1975).

Mr. Turco thereafter both served a notice of appeal to the New York Court of Appeals and also moved in the Court of Appeals for an order granting leave to appeal[3] (6a). Mr. Turco's attorney presented a 51 page affidavit in support of the right to appeal and, in the alternative, in support of a motion for leave to appeal (6a, 20a). Among other things, the affidavit described the constitutional issues involved in the appeal. The New York Court of Appeals dismissed the Notice of Appeal taken as of right "upon the ground that no substantial constitutional question

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3. See N.Y. Constitution, Article 6, Section 3 (McKinney 1969); N.Y. Judiciary Law § 90 (subd. 8) (McKinney 1968); N.Y. CPLR 5601, 5602 (McKinney 1975-1976 Supp.). The procedures for appellate review of disciplinary action by the Appellate Division were discussed in Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y. 1974) and Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975), affd. ___ U.S. ___, 47 L.Ed.2d 751, 95 S.Ct. 1489 (1976).

is directly involved"[4] (36 N.Y.2d 490; 366 N.Y.Supp. 2d 1029) and denied the motion for leave to appeal (36 N.Y.2d 642, 366 N.Y. Supp. 2d 1026).

Mr. Turco's petition for a writ of certiorari presented the same issues of constitutional law as those raised in the present appeal. Certiorari was denied.

By his complaint filed in the District Court on March 11, 1975,[5] Mr. Turco seeks to enjoin the Appellate Division from enforcing its order of disbarment. By orders of Judge Burke, the order of disbarment has been stayed first pending the hearing on a motion for a preliminary injunction and cross-motions for dismissal of the complaint, then pending decision on the motions, and then pending this appeal (1a, 78a).

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4. This dismissal constitutes a determination on the merits that the constitutional claims raised by appellant are lacking in substance. Cohen and Kargen, Powers of the New York Court of Appeals (Rev. ed. 1952), pp.252-254; 7 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶ 5601.08. Although the dismissal may be a determination that the due process arguments raised are not "directly involved" (Cohen and Kargen, supra, pp.261-274), it would appear that most, if not all, of appellant's due process claims were necessarily involved in the decision by the Appellate Division.

5. The complaint was filed, and a stay of enforcement obtained from Judge Burke, before the petition for a writ of certiorari was filed in Supreme Court.

The Bar Association moved on April 24, 1975 to dismiss the action on the grounds that the District Court lacked jurisdiction, that the complaint failed to state a claim upon which relief can be granted, and that the action was barred by res judicata and the doctrine of abstention (15a-21a). The Appellate Division moved on March 17, 1975 to dismiss the complaint for essentially the same reasons (70a-71a).

On July 2, 1976 judgment dismissing the action was entered (78a). In his decision Judge Burke found that Mr. Turco's arguments regarding the denial of a right to appeal from the disbarment order were without merit. Judge Burke also held that the District Court should not otherwise interfere in state disciplinary proceedings (76a-77a).

ARGUMENT

POINT I

THE DUE PROCESS CLAIMS RAISED BY APPELLANT ARE BARRED BY RES JUDICATA OR ARE OUTSIDE THE DISTRICT COURT'S ORIGINAL JURISDICTION

Appellant seeks to have the District Court enjoin the final judgment of disbarment entered after judicial proceedings in State court. Apart from the equal protection claim (See Point II, infra), his constitutional arguments attack specific rulings made in the state proceeding regard-

ing the sufficiency of the hearing afforded to him, the adequacy of notice, and the weight, if any, accorded various evidence. While these arguments are plainly without merit, the threshold question is whether they may be considered in federal district court or whether these arguments are barred by res judicata, and other limitations on the jurisdiction of the district court.

A. There are Strong Policy Reasons for Non-interference in State Court Disciplinary Matters.

In Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972), where this Court refused to enjoin a state court from conducting disciplinary proceedings against an attorney, in spite of the allegation that the proceedings were intended to discourage the exercise of First Amendment rights, Judge Mansfield summarized the strong state interests in the professional conduct of attorneys practicing before state courts (458 F.2d at 1210):

> "Thus, while 'the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights,' we see no sound reason for exempting a pending state court disciplinary proceeding from the principles of federal-state comity underlying Younger and its companion cases. The issue before us is not merely the constitutionality of a state court's action in a suit between third parties but its application of standards established by it for

observance by its own officers. Although a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights, e.g., Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers. See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971), decided the same day as Younger.

"The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of disciplinary proceeding against its officer, the state judiciary might suffer unfair and unnecessary blow to its integrity and effectiveness."

Judge Lumbard, in a concurring opinion, emphasized the same considerations (458 F.2d at 1212):

"The relationship between state and federal courts has always been a delicate one; maintaining the appropriate balance between the dual sovereignties existing under our constitutional system is difficult at best. Overlapping jurisdictions between state and federal courts contribute to potential difficulties and this is particularly true when a proceeding in one court system is alleged to infringe rights susceptible of vindication in the other. To minimize the potential for conflict between the state and federal systems, federal court jurisdiction has been intentionally limited."

In Tang v. Appellate Division of the N.Y. Supreme Court, First Dept., 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), where the Court affirmed the dismissal of an attack on the constitutionality of a New York statute requiring six months' actual residence for admission to practice law, Judge Mulligan observed (487 F.2d at 143):

> "... this Court has been particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts."

In Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975), cert. denied, ___ U.S. ___ (1976), where this Court held that the district court had properly restrained from interference with disciplinary proceedings against an attorney, Judge Mulligan, drawing a comparison with Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), stated as follows (515 F.2d at 432):

> "The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is at least as great as the interests of the State of Ohio in policing the exhibition of pornographic material. Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the

> interloping of a federal court. As Mr. Justice Frankfurter observed in Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957), the 'two judicial systems of Courts, the state judicatures and the federal judicary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.'"

The same considerations appear in the opinion of Judge Neaher in Mildner v. Gulotta, 405 F.Supp. 182, 191-193, 196-199 (E.D.N.Y. 1975), aff'd. ___ U.S. ___, 47 L.Ed.2d 751, 95 S.Ct. 1489 (1976), and are the basis for his conclusion that the district courts should not interfere with attorney discipline proceedings in state court, even where the proceedings have resulted in a final determination.

B. The State Courts Are Competent To Adjudicate Constitutional Claims.

Although the above cases, with the exception of Mildner v. Gulotta, might be given the narrow reading that federal courts should abstain from interference with pending state court disciplinary actions, the policy considerations favoring the autonomy of the state judiciary have a further reach. As this Court stated in Erdmann v. Stevens, 458 F.2d 1205, 1211 (2d Cir.), cert. denied, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972),

> "The competency of New York State courts to decide questions arising under the federal

> constitution, by which we are all governed, is beyond question. In the unlikely event that both of these state appellate courts apply improper standards, Erdmann could seek Supreme Court review by petition for writ of certiorari. Undoubtedly, because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages."

In Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975), cert. denied, ___ U.S. ___ (1976), this Court again urged an attorney seeking to enjoin disciplinary action to present his federal questions in the state judicial proceedings (515 F.2d at 432):

> "Whatever federal constitutional questions are involved here can certainly be raised in the state courts and ultimately addressed to the Supreme Court and appellant proffers no contrary contention."

Although 42 U.S.C. § 1983 permits a federal court to enjoin proceedings in state court (Mitchum v. Foster, 407 U.S. 225, 36 L.Ed.2d 705, 92 S.Ct. 2151 (1972)), the Supreme Court has carefully limited the circumstances justifying that action. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975), affd. 47 L.Ed.2d 751, 95 S.Ct. 1489 (1976), Judge Neaher

perceptively concluded that Huffman v. Pursue, Ltd. requires that involuntary state defendants, who have a constitutional defense arising out of state actions, must seek a state resolution of the merits of the constitutional claim (405 F.Supp. at 197).

We recognize that Lombard v. Board of Education of City of New York, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975) holds that a teacher dismissed without a hearing may raise federal due process claims in federal district court even though he failed to present that claim in a state court challenge to the administrative actions. The principles of Lombard, however, do not apply where the federal action seeks to raise issues of notice, admissibility and use of evidence, and other due process contentions that are properly part of the judicial proceedings in state court. Where, as here, the due process contentions directly involve intermediate rulings necessarily made in state court, or the elements of the state court's determinations of fact and application of discretion, the defendant in state court may not withhold these contentions for federal review under 42 U.S.C. § 1983.

C. Res Judicata Bars the Relitigation of Constitutional Claims Actually Presented in the State Court Proceedings and Those Necessarily Involved in Rulings by the State Courts.

In the proceedings before the Appellate Division, appellant urged his argument based on North Carolina v. Alford, 400 U.S. 25 (1970), and his arguments that he was entitled to a due process hearing of some nature other than the mitigation hearing and other opportunities to be heard actually afforded to him (28a-30a; 48a-58a). These due process contentions were repeated in a written submission to the New York Court of Appeals. In addition, appellant there added the claim that he had a due process right to one appeal from a court of original jurisdiction and the claim that his disbarment was based on matters beyond the written charges. Under principles of res judicata, the state court's disposition of these claims bars appellant from relitigating them in federal court.

It is settled in this Circuit that res judicata applies to issues actually decided in state court. Tang v. Appellate Div. of Sup. Ct., First Dept., 487 F.2d 138, 142 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 872 (1974); Thistlewaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Lombard v. Board of Education of the City of New York, 502 F.2d 631,

637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); Friendly, Federal Jurisdiction: A General View 101-02 n. 113 (1973), cf. Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975).

Moreover, although not necessary for the decision of the appeal, we submit that res judicata applies to those issues not expressly reserved in state court which were integrally involved in the state court proceedings. Compare Taylor v. New York City Transit Auth., 433 F.2d 665 (2d Cir. 1970) with Lombard v. Board of Educations of the City of New York, supra. As recognized by the Court in Taylor, where a defendant in a state court proceeding is afforded a hearing, and has the opportunity to raise objections to matters involving procedural due process of law, he must present his claims at that time. In those circumstances, the application of res judicata and waiver to bar subsequent review in federal district court follows necessarily from the important policies of federalism which require respect for the integrity of the state court disciplinary proceedings.

D. The District Court Lacks Jurisdiction to Review a State Court Determination of Appellant's Due Process Contentions.

A corollary to the principle of res judicata is the principle that a district court does not have jurisdic-

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October 29, 1976

Mr. A. Daniel Fusaro
Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Arthur F. Turco, Jr. v. The Monroe County Bar Association, et al.

Dear Mr. Fusaro:

This will confirm your telephone conversation with our office today in which we indicated that there is no missing textual matter from our brief although there is a pagination error which resulted in the omission of a page 18.

Very truly yours,

Michael T. Tomaino

MTT:lmh

tion to review state court proceedings for possible constitutional error. That principal was emphatically declared by the Supreme Court in Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416, 44 S.Ct. 149, 68 L.Ed. 362 (1923):

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and inclusive adjudication. ... Under the legislation of Congress, no court of the United States other than this court, could entertain a proceeding to reverse or modify the judgment for errors of that character. ... To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original."

The Court restated the principle in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, 90 S.Ct. 1739, 1742, 26 L.Ed.2d 234 (1970), as follows:

> "[w]hile the lower federal courts were given certain powers in the 1789 [Judiciary] Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially

> separate legal systems. Each system proceeds independently of the other with ultimate review in [the Supreme] Court of the federal questions raised in either system."

The same considerations apply in civil rights actions brought under 42 U.S.C. § 1983 and preclude the exercise of jurisdiction where the character of the action requires the district court to exercise appellate review. E.g., Tang v. Appellate Div. of Sup. Ct., First Dept., 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Anderson v. Lecon Properties, Inc., 457 F.2d 929 (8th Cir.), cert. denied, 409 U.S. 879 (1972); cf. Javits v. Stevens, 382 F.Supp. 131, 136-137 (S.D.N.Y. 1974).

The application of the principle in this instance is clear. Appellant received an extensive hearing in the State disciplinary proceedings. He had the opportunity to present his contentions to the Appellate Division in briefs and oral argument. The evaluation of his procedural due process contentions would mandate a consideration of the entire record of the state court proceeding. In substance, if not in form, appellant is asking the federal district court to exercise appellate review of the proceedings in state court. Such review is not provided by the statutes controlling the jurisdiction of federal courts.

POINT II

THE EQUAL PROTECTION ARGUMENTS ARE WHOLLY WITHOUT MERIT IN VIEW OF MILDNER V. GULOTTA

Mr. Turco's claim that New York's procedures for appellate review deny equal protection of the laws is without merit. That claim was rejected in Javits v. Stevens, 382 F.Supp. 131 (S.D.N.Y. 1974) and Mildner v. Gulotta, 405 F.Supp. 182, 193-194 (S.D.N.Y. 1975), affd. ___ U.S. ___, 47 L.Ed. 2d 751, 95 S.Ct. 1489 (1976).

If Mr. Turco is correct in his suggestion that the decision in Mildner v. Gulotta was not on the merits (Appellant's Brief, pp.28-29), his argument proves too much. In fact, in all material respects the posture of Mr. Turco's case is the same as the posture presented in Mildner. In his papers submitted to the New York Court of Appeals, Mr. Turco contended that the right to appeal from a court of original jurisdiction "exists in accordance with due process of law." (Notice of Motion, Affidavit and Brief in papers before New York Court of Appeals, p.8.) If Mr. Turco wished to present his equal protection argument, he could have presented it at that time. Rather than invoking the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(2), Mr. Turco petitioned for a writ of certiorari, raising the same issues that he now presents. Because the plaintiffs in

Mildner and Mr. Turco had the same avenue of presenting the constitutional points to the Supreme Court by appeal, and none of the plaintiffs had the effective opportunity of meaningful review at the time the federal actions were decided, the situations are not distinguishable. The fact that Mr. Turco sought a writ of certiorari, while the plaintiffs in Mildner did not, fails to afford a basis for a meaningful distinction.

Accordingly, if Mildner is read as a decision on the merits, Mr. Turco's equal protection argument is plainly insubstantial. If Mildner stands for the proposition that federal review of a state court's decision in a disbarment action is available only by appeal or certiorari in the United States Supreme Court, then affirmance is required.

POINT III

NEW YORK'S PROCEDURES PERMITTING A HEARING IN MITIGATION, BUT NOT AN OPPORTUNITY TO RELITIGATE CRIMINAL CONVICTIONS, FULLY COMPLY WITH THE REQUIREMENTS OF DUE PROCESS

There is no merit in the claim that New York may not hold that evidence of conviction of a crime stands as proof of the commission of the underlying criminal act. The New York rule, explained by the Court of Appeals in Matter of Levy, 37 N.Y.2d 279 (1975), comports with the "general

direction of the law." (Appellant's Brief, p.25.) See, Annotation, Plea of Nolo Contendere, 89 ALR2d 540, 606-608.

Nothing in North Carolina v. Alford, 400 U.S. 25 (1976), is to the contrary. Alford permits a court to accept a plea of guilty, in spite of a protestation of innocence, if the "defendant intelligently concludes that his interests require entry of a guilty plea and the record before the Judge contains strong evidence of actual guilt" (400 U.S. at 37). Alford cannot be read as forbidding a state court, in a disciplinary proceeding against an attorney, from making the convictions binding and conclusive where, as here, the pleas were intelligently made and strong evidence of actual guilt appears in the record.

Moreover, appellant has deliberately distorted the actual circumstances of his plea in Maryland when he repeatedly asserts that he there interposed a plea of guilty under North Carolina v. Alford, supra, while asserting his innocence. (Appellant's Brief, p.5, 8, 9 n. 3, 27.) This assertion, repeated throughout the proceedings in the New York State courts, is contrary to the record (54a-55a). The transcript of the proceedings in Baltimore, Maryland show clearly that the trial court interrupted Mr. Turco's counsel when he stated that Mr. Turco "was totally innocent of all the charges" and the following conversation occurred:

"THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant."

* * *

"As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in anyway that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

"MRS. O'CONNER: Correct. We would ask the entire portion starting 'If Mr. Turco were called to the stand ...' to be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

"MR. KUNSTLER: I would agree to that." (Emphasis Supplied.)

Appellant's suggestion that the pleas were entered in confident reliance that collateral consequences would not follow is equally false. The transcript of the Maryland proceedings, attached to the petition of the Bar Assocation (23a), contains the statement of the prosecuting attorney that one of the considerations for accepting petitioner's

plea to a reduced charge was "...[that] by pleading guilty to assault Mr. Turco is exposing himself to the sanction of the Bar Assocation of the State of New York and will be subject to disbarment proceedings in that State." Similarly, the transcript of the New York proceedings, also attached to the petition of the Bar Association (24a), contains a statement by the prosecuting attorney that Mr. Turco was admitted to practice law in New York and "under the circumstances,... the charges against the defendant are extremely serious, and ... the Court should consider this in imposing sentence on this defendant."

In the disciplinary proceedings, Mr. Turco had notice and an opportunity to be heard before collateral consequences were attached to his two convictions. He was served with a written petition containing the charges. He responded with an elaborate answer and then a motion to dismiss. He submitted a written brief and his counsel argued the issues before the Appellate Division (28a). Hearings on matters of mitigation covered 7 days and resulted in over 800 pages of testimony (20a). Mr. Turco was permitted to explain the reasons for his pleas, although he was not permitted to attack the convictions by collateral proof (20a, 8a). He submitted a 69-page brief on the issue of what discipline, if any, was appropriate. His counsel was

again permitted oral argument before the Appellate Division (59a).

For these reasons, Mr. Turco has had ample notice and opportunity to be heard. His due process arguments are plainly without merit.

POINT IV

APPELLANT HAD ADEQUATE NOTICE AND OPPORTUNITY TO RESPOND TO THE CHARGES ON WHICH THE DISBARMENT WAS BASED

The opinion of the Appellate Division adequately demonstrates that the Court was aware that appellant had been charged in the petition with two specific convictions of misdemeanors, one of which was serious in nature and resulted in a serious sentence. Because appellant asserted in his verified answer and in his testimony at the mitigation hearing that he was innocent of all charges, and entered guilty pleas for reasons of ill health, lack of funds and hostile judicial attitudes, it was incumbent upon the Court to review the record to determine whether there had been, in the language of North Carolina v. Alford, 400 U.S. 24, 37 (1970), "strong evidence of actual guilt." The Appellate Division expressly indicated that it was reviewing the evidence offered by the prosecution in each case, not to make findings based on recitations by the prosecutors, but

to evaluate appellant's claims regarding the reasons for his pleas (46 A.D.2d at 493, 501-502; 363 N.Y.S.2d at 352, 359).

Although appellant objects to the Appellate Division's comments on his activities in Canada (Appellant's Brief, p. 19; See 46 A.D.2d at 496-497, 502; 363 N.Y.S. 2d at 355, 360), the fact is that appellant introducted this subject in his verified answer (under the euphemistic heading "Stay in Canada") and in his direct testimony at the mitigation hearing. He frankly admitted that, after arraignment in New York County on various charges, he went to Montreal to give a speech. While there, he learned he had been indicted in Maryland, and he stayed in Canada, using an assumed name, until extradition proceedings were begun more than 7 months later. These matters were addressed by appellant in his post-hearing brief to the Appellant Division. No claim was ever made that he did not have adequate notice of these matters, nor could any such claim be made because he voluntarily interjected the subject into the hearing.

CONCLUSION

For the foregoing reasons, the judgment dismissing the action should be affirmed.

October 28, 1976

Respectfully submitted,

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Affidavit of Service

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The Daily Record

October 28, 1976

Re: TURCO V MONROE COUNTY BAR ASSOCIATION ETAL

State of New York)
County of Monroe) ss.:
City of Rochester)

ANN M. UPDAW

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
NIXON, HARGRAVE, DEVANS AND DOYLE
(WILLIAM D. EGGERS, ESQ.)
Attorney(s) for
MONROE COUNTY BAR ASSOCIATION
On October 28, 1976
(s)he personally served ~~three (3)~~ (2) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

WILLIAM KOGAN, ESQ. ASST. ATTORNEY GENERAL
DEPARTMENT OF LAW
ALBANY, NY 12224

MORTON STAVIS, ESQ. &
DORIS PETERSON, ESQ.
CENTER FOR CONSTITUTIONAL RIGHTS
853 BROADWAY
NY, NY 10003

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Ann M. Updaw

Sworn to before me this 28th day of October 1976

John O'Mara

~~Notary Public~~
Commissioner of Deeds